Alaris Health at Rochelle Park *and* 1199, SEIU United Healthcare Workers East. Cases 22−CA−124968, 22−CA−125889, and 22−CA−140560

December 21, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On February 25, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a combined reply brief to the answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the judge's recommended Order as modified and set forth in full below.[5]

In adopting the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to immediately reinstate 10 unfair labor practice strikers to their former jobs after they submitted their unconditional offer to return to work on September 20, 2014,[6] we note that there

[1] This case is one of four related cases involving unfair labor practice strikers at facilities affiliated with Alaris Health. See, in addition to this case, *Alaris Health at Castle Hill*, 367 NLRB No. 52 (2018); *Alaris Health at Harborview*, 367 NLRB No. 54 (2018); and *Alaris Health at Boulevard East*, 367 NLRB No. 53 (2018). The judge heard these cases consecutively and issued four separate decisions. The Respondent and the Charging Party each submitted consolidated briefs addressing all four cases, while the General Counsel submitted a separate brief in each case.

[2] Member Emanuel is recused and took no part in the consideration of this case. Additionally, former Member Hirozawa and Ellen Dichner, former Member Pearce's chief counsel, took no part in the consideration of this case. Therefore, we deny as moot the Respondent's Motion to Disqualify Board Member Kent Y. Hirozawa and Chief Counsel Ellen Dichner.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by (1) refusing to bargain in good faith with the Union's chosen bargaining committee, (2) unreasonably delaying in providing the Union with requested information that was relevant and necessary for bargaining, (3) refusing to provide the Union with requested information concerning health insurance and daily work schedules, and (4) denying union agent Christina Ozual access to the facility without giving the Union an opportunity to bargain over that change.

Also in the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by (1) threatening employees with job loss, loss of work hours, and other changes in their terms and conditions of employment if they went on strike; and (2) interrogating employees about whether they were going to participate in the strike.

Lastly, in the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by reducing the work hours of Jean Fritz, Julieta Dominguez, Jacinta Hormaza, and Jamir Gaston and by denying Deloris Alston the opportunity to work overtime. Although the Respondent filed an exception to the judge's factual finding that Dominguez, Hormaza, Gaston, and Alston were "Locked-Out on September 20," the Respondent did not except to the judge's finding that it unlawfully changed their terms and conditions of employment. In any event, the Respondent did not present any argument or evidence in support of this exception. Accordingly, we find, pursuant to Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, that this bare exception should be disregarded. See, e.g., *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 1 fn. 1 (2018) (citing *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007)).

In affirming the judge's findings, we do not rely on his citation to *Alcan Rolled Products*, 358 NLRB 37 (2012), which was issued by a panel subsequently found invalid by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Although *Wayneview Care Center*, 352 NLRB 1089 (2008), a two-member decision cited by the judge, was vacated by the United States Court of Appeals for the District of Columbia Circuit following issuance of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), we rely on it here because a three-member panel of the Board incorporated the decision by reference in a subsequent decision, and that decision was enforced. See 2010 WL 5173270 (D.C. Cir. 2010) (order vacating and remanding to the Board), 356 NLRB 154 (2010), enfd. 664 F.3d 341 (D.C. Cir. 2011). We note that *Atlas Refinery, Inc.*, 354 NLRB 1056 (2010), another two-member decision cited by the judge, was also reaffirmed and incorporated by reference in a subsequent decision by a three-member panel. 357 NLRB 1798 (2011), enfd. 620 Fed. Appx. 99 (3rd Cir. 2015).

[4] In his Conclusion of Law 5(c), the judge concluded that the Respondent violated Sec. 8(a)(1) by denying Ozual access to the facility without giving the Union an opportunity to bargain; in his decision, however, the judge found that this conduct violated Sec. 8(a)(5). We have amended the conclusions of law to correct this inadvertent error.

[5] We have amended the judge's recommended remedy. We have also modified the judge's recommended Order consistent with the violations found, the amended remedy, and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[6] Those 10 strikers are CNAs Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, and Deloris Alston, housekeeping employees Julieta Dominguez and Jacinta Hormaza, and dietary aide employees Jamir Gaston and Rodley Lewis. Abellard, Padda, Meronvil, Vilceus, and Youmane were ultimately returned to work between September 28 and October 18. Dominguez, Hormaza, Alston, and Gaston were returned between September 22 and September 24, but their hours were reduced. Alston's hours were restored on October 5, but she still has not received her former overtime opportunities. Dominguez, Hormaza, and Gaston still have not been offered their former hours. Lewis was never offered reinstatement.

is no exception to the judge's finding that the 3-day strike was an unfair labor practice strike. Because the strike was an unfair labor practice strike, we reject the Respondent's argument that its contracts with staffing agencies that supplied temporary replacements during the strike and its status as a health care facility justified its failure to immediately reinstate the strikers after their unconditional offer to return to work. See *Alaris Health at Castle Hill*, 367 NLRB No. 52 (2018) (holding that an employer's contractual obligation to retain temporary strike replacements for a minimum period of time does not constitute a legitimate and substantial business justification for denying immediate reinstatement to unfair labor practice strikers). In addition, while employers generally have a 5-day administrative grace period to reinstate unfair labor practice strikers under *Drug Package Co.*, 228 NLRB 108, 113–114 & fn. 28 (1977), enf. denied in part on other grounds 570 F.2d 1340 (8th Cir. 1978), the Respondent disavowed any claim that its multi-week delay in reinstating the unfair labor practice strikers was justified by the grace period described in *Drug Package Co*., and we find that the Respondent was not entitled to this grace period. See, e.g., *Teamsters Local 574*, 259 NLRB 344, 344 fn. 2 (1981) (citing *Interstate Paper Supply Co*., 251 NLRB 1423 (1980)) (Where "an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day grace period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.").

Even assuming arguendo that a delay beyond 5 days in reinstating unfair labor practice strikers could ever be justified by an employer's contractual obligation to retain temporary strike replacements for a minimum period of time, the Respondent would have failed to demonstrate that its agency contracts justified denying immediate reinstatement to the ten strikers. See *Alaris Health at Castle Hill*, above, slip op. at 5. Preliminarily, the contracts could not have justified the Respondent's failure to immediately reinstate housekeeping employees Julieta Dominguez and Jacinta Hormaza and dietary aide employees Jamir Gaston and Rodley Lewis because the staffing agencies supplied Rochelle Park with CNAs only, and there is no evidence that any agency-supplied employee performed any housekeeping or dietary aide work. See *Sutter Roseville Medical Center*, 348 NLRB 637, 637 fn. 7, 645−647 (2006) (finding employer's contracts with temporary staffing agencies did not justify its delay in reinstating economic strikers not replaced by agency-supplied employees).

As to the six CNAs denied immediate reinstatement, although the Respondent's contract with Tristate Rehab Staffing required the Respondent to retain two Tristate employees for 4 weeks, and the Respondent's contract with Towne Nursing Staff required the Respondent to retain nine Towne employees for 4 weeks, there is no credited evidence in the record regarding the parties' negotiations that resulted in those contract terms. In addition, only five agency-supplied employees (one from Tristate and four from Towne) actually worked at Rochelle Park after the strike ended, and the Respondent has not provided any evidence that it had to compensate Tristate or Towne for replacements who were guaranteed employment after the strike but did not work. As a result, there is no basis upon which to find either that the staffing agencies required the lengthy minimum terms as a condition of supplying the temporary strike replacements or that the Respondent was financially liable for any agency employees it did not use after the strike ended. Moreover, even if the Respondent's contractual obligations could have justified denying immediate reinstatement to some of the CNA strikers, the contracts could not justify the Respondent's refusal to immediately reinstate at least one of the six, since only five agency-supplied employees worked at Rochelle Park after the strike ended. *Alaris Health at Castle Hill*, above, slip op. at 5.

For all of the foregoing reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate ten unfair labor practice strikers on their unconditional offer to return to work.[7]

AMENDED CONCLUSION OF LAW

1. Add the following to Conclusion of Law 4:

"(d) unilaterally changing employees' terms and conditions of employment without giving the Union notice and opportunity to bargain over such change when it denied Christina Ozual access to meet with employees in the facility in August 2014."

2. Delete Conclusion of Law 5(c).

To the extent the Respondent's bare exception to the judge's finding that the 10 strikers were "Locked-Out on September 20" is intended as an exception to the judge's finding that they were denied immediate reinstatement to their former jobs, we find that it should be disregarded. See fn. 3, supra.

[7] Backpay for this violation shall commence as of September 20, when the strikers, through their union, unconditionally offered to return to work. See *Teamsters Local 574*, 259 NLRB 344, 344 fn. 2 (1981) (citing *Interstate Paper Supply Co.*, 251 NLRB 1423 (1980) ("[I]f an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.")).

AMENDED REMEDY

We amend the judge's remedy as follows.[8] First, the judge ordered the Respondent to recall the 10 strikers denied immediate reinstatement on September 20. However, the judge found, and no party disputes, that five of the strikers have been reinstated to their former jobs. We shall not order the Respondent to offer reinstatement to those strikers. As to the remaining five strikers, four—Deloris Alston, Julieta Dominguez, Jacinta Hormaza, and Jamir Gaston—have also been reinstated, but they were not granted full reinstatement to their former jobs because Alston has been unlawfully denied her former overtime opportunities, and Dominguez, Hormaza, and Gaston have had their hours unlawfully reduced. The fifth, Rodley Lewis, has not been reinstated. In addition, an 11th striker, Jean Fritz, was reinstated immediately, but his hours were unlawfully reduced. Accordingly, we shall order the Respondent to offer Alston, Dominguez, Hormaza, Gaston, Lewis, and Fritz full reinstatement to their former jobs, including their former hours and overtime opportunities.

Second, we shall order the Respondent to make Alston, Dominguez, Hormaza, Gaston, and Fritz whole for any loss of earnings and other benefits suffered as a result of the changes to their terms and conditions of employment (denial of overtime opportunities; reduction in hours) in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Third, in accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Alaris Health at Rochelle Park, Rochelle Park, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1199, SEIU United Healthcare Workers East (the Union) because of the composition of the Union's bargaining committee.

(b) Refusing to bargain collectively with the Union by refusing to provide and unreasonably delaying in providing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, including health insurance and daily work schedule information.

(c) Refusing to permit the Union's representative to meet at reasonable times with employees in the facility's employee break room.

(d) Threatening employees with job loss, loss of work hours, or other changes in their terms or conditions of employment if they go on strike.

(e) Coercively interrogating employees about their union activities and/or support.

(f) Failing and refusing to immediately reinstate employees who engage in an unfair labor practice strike to their former jobs or to substantially equivalent positions upon their unconditional offer to return to work.

(g) Changing the terms or conditions of employment of employees because they have engaged in an unfair labor practice strike.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional

[8] As noted above, supra fn. 3, the Respondent has not excepted to the judge's finding that it unlawfully refused to bargain with the Union's chosen bargaining committee. Nor does it argue that the judge's recommended affirmative bargaining order is improper. We therefore find it unnecessary to provide a specific justification for the affirmative bargaining order. See *Lily Transportation Corp.*, 363 NLRB No. 15, slip op. at 3 fn. 5 (2015), enfd. 853 F.3d 31 (1st Cir. 2017); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see also *Scepter Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

(b) Furnish to the Union in a timely manner the information it requested concerning health insurance and daily work schedules.

(c) On request, permit the Union's representative to meet at reasonable times with employees in the facility's employee break room.

(d) Within 14 days from the date of this Order, offer Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, and Jean Fritz full reinstatement to their former jobs, including their former hours and overtime opportunities, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, and Rodley Lewis whole for any loss of earnings and other benefits suffered as a result of its unlawful failure to immediately reinstate them upon their unconditional offer to return to work in the manner set forth in the remedy section of the judge's decision as amended in this decision, plus reasonable search-for-work and interim employment expenses.

(f) Make Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, and Jean Fritz whole for any loss of earnings and other benefits suffered as a result of its unlawful changes to their terms or conditions of employment in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to immediately reinstate Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, and Rodley Lewis upon their unconditional offer to return to work, and within 3 days thereafter notify them in writing that this has been done and that the failure to immediately reinstate them will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Rochelle Park, New Jersey, copies of the attached notice marked "Appendix"[9] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2014.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 2018

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John F. Ring, Chairman

_____

Lauren McFerran, Member

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with 1199, SEIU United Healthcare Workers East (the Union) because of the composition of its bargaining committee.

WE WILL NOT refuse to bargain collectively with the Union by refusing to provide or unreasonably delaying in providing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees, including health insurance and daily work schedule information.

WE WILL NOT threaten you with job loss, loss of hours, or other changes to your terms or conditions of employment if you go on strike.

WE WILL NOT coercively interrogate you about your union activities and/or support.

WE WILL NOT refuse to permit the Union's representative to meet with you at reasonable times in the facility's employee break room.

WE WILL NOT fail and refuse to immediately reinstate employees who engage in an unfair labor practice strike upon their unconditional offer to return to work.

WE WILL NOT change your terms and conditions of employment because you have engaged in an unfair labor practice strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

WE WILL furnish to the Union in a timely manner the information it requested concerning health insurance and daily work schedules.

WE WILL, on request, permit the Union's representative to meet with you at reasonable times in the facility's employee break room.

WE WILL, within 14 days from the date of the Board's Order, offer Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, and Jean Fritz full reinstatement to their former jobs, including their former work hours and overtime opportunities, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, and Rodley Lewis whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to immediately reinstate them upon their unconditional offer to return to work, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL make Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, and Jean Fritz whole for any loss of earnings and other benefits suffered as a result of our unlawful changes to their terms and conditions of employment, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to immediately reinstate Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, Deloris Alston, Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, and Rodley Lewis upon their

unconditional offer to return to work, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the failure to immediately reinstate them will not be used against them in any way.

ALARIS HEALTH AT ROCHELLE PARK

The Board's decision can be found at www.nlrb.gov/case/22-CA-124968 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Saulo Santiago, Michael P. Silverstein, and *Eric B. Sposito, Esqs.,* for the General Counsel.

David F. Jasinski and *Rebecca D. Winkelstein, Esqs. (Jasinski, P.C.),* of Newark, New Jersey, for the Respondent.

William S. Massey and *Patrick J. Walsh, Esqs. (Gladstein, Reif & Meginniss, LLP),* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This proceeding was the last of four cases tried ad seriatim involving Alaris Health's New Jersey nursing homes and their unionized employees. Heard in Newark, New Jersey, on September 11 and October 6–7, 2015, the case addressed complaint allegations that Alaris Health at Rochelle Park (Rochelle Park, Bristol Manor, or Respondent), committed numerous unfair labor practices relating to 2014[1] bargaining for a new contract: (1) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[2] by refusing to meet with the Union's chosen bargaining committee and then delaying and refusing to provide information requested by the Union which was relevant to bargaining; (2) violated Section 8(a)(1) by attempting to stifle employee participation in a likely strike through coercive interrogation, threats of job loss or other changes to terms and conditions of employment, and removing a union representative from its facility; and (3) violated Section 8(a)(3) and (1) by refusing to reinstate 1 employee striker after he unconditionally offered to return to work, delaying the reinstatement of 9 other employees, and changing the terms and conditions of employment of 5 employees after they returned to work after the strike.[3]

Rochelle Park contends that the Charging Party, Service Employees International Union 1199 (the Union), is bogged down on past history in negotiating for successor contracts and engaged in a series of acts designed to "set up" Rochelle Park for unfair labor practice charges, which it denies, and then used those charges to mask an economic strike at Rochelle Park and the other three Alaris facilities as an unfair labor practice strike.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Rochelle Park,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

Rochelle Park, a corporation, operates a nursing home and rehabilitation center providing in-patient medical care at its facility in Rochelle Park, New Jersey, where it annually derives gross revenues in excess of $100,000 and purchases and receives goods valued in excess of $5000 directly from points outside the State of New Jersey. Rochelle Park admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as well as a health care institution within the meaning of Section 2(14) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

At the relevant times in this complaint, Rochelle Park's supervisors and agents included: Kristine Giles, the administrator; Dexter Caldona, the director of nursing; Arlene Concepcion, the dietary director; Peter German, housekeeping director; Susan Posluzny, a quality assurance nurse; and Moses Adu, staffing coordinator. David Jasinski, Esq., has served as Rochelle Park's labor counsel and chief negotiator during collective bargaining, accompanied by Mendy Gold, an Alaris principal. Regina Figueroa is a vice president of Alaris Health.[5]

Rochelle Park and its predecessors have recognized the Union as the exclusive collective-bargaining representative of approximately 110 employees in successive collective-bargaining agreements (CBA), the most recent of which was effective from April 1, 2010, to March 31, 2014:

[1] Unless otherwise indicated, all dates refer to 2014.

[2] 29 U.S.C. §§ 151–169.

[3] The complaint was amended to modify complaint pars. 17, 20, 22, 25–26, 33–35, and 48. Par. 29 was withdrawn and par. 36(c) was added. (GC Exh. 301(y).)

[4] Notwithstanding my instruction that counsel submit one "omnibus" brief addressing all four cases, the General Counsel submitted separate briefs for each case. All four Respondents moved to strike the General Counsel's briefs. I decided against such an extreme measure but, in order to ensure that there was no prejudice to Respondents, I permitted them to submit supplemental briefs in each case. Rochelle Park declined the option.

[5] Rochelle Park admitted only that Jasinski was a 2(13) supervisor. However, the undisputed facts established that Giles, Caldona, German, and Concepcion were supervisors within the meaning of Sec. 2(11), while Figueroa, Adu, and Posluzny acted as statutory agents.

> All CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.[6]

The Union's leadership includes: Milly Silva, the executive vice president; Clauvice Saint Hilaire, the vice president; and Ron McCalla and Christina Ozual, union organizers. During collective bargaining, the Union's chief negotiator was William Massey, Esq., assisted by McCalla. Pursuant to the expiring agreement,[7] the Union designated the following Rochelle Park employees as members of the bargaining committee: Max Predestin, Deloris Alston, Marie Moise, Wanieta Davis, Jean Fritz Pierre, Jamir Gaston, and Adeline Deriphone.[8]

Notwithstanding an employee strike in 2009 during negotiations over the 2010−2014 agreement, the parties enjoy a relationship that both describe as respectful. The parties began meeting shortly before the 2010 contracts expired for Rochelle Park, Alaris at Boulevard East, Alaris at Castle Hill, and Alaris at Harborview. However, controversy soon erupted over the composition of the Union's bargaining committee and information requested by the Union.

B. The Union's Information Requests

1. The December 27, 2013 request

Saint Hilaire initiated the process for a new contract in a letter, dated December 27, 2013. He requested that Rochelle Park engage in bargaining and offered alternative dates in February. He also requested that Rochelle Park furnish the Union with the following information by January 24: detailed job descriptions and performance evaluations describing job duties for bargaining unit positions; summary plan descriptions and related costs of available fringe benefits such as health insurance, disability, pension, profit sharing and 401(k) plans;[9] numbers of employees covered by health insurance and related costs; temporary staffing agencies used and related costs; work schedules for each nursing unit from January to October 2013; OSHA injury and illness records for 2011−2013; health and safety policies; overtime work policies, shift differentials, and premium pay; gross annual payroll information; cost reports submitted to Medicaid; and any other documents describing any terms and conditions of employment for unit members.[10]

Jasinski had several conversations with McCalla and Massey in January about dates to commence collective bargaining. He apprised them several times that he would be engaged in a lengthy trial in Atlantic City, New Jersey, during portions of January and February. The trial eventually started on February 9 and lasted until March 22. Rebecca Winklestein, Esq., Jasinski's co-counsel in this proceeding, served a similar role in that case.

At some point during those discussions, Jasinski suggested a brief contract extension, but did not request an extension of time to respond to the Union's December 27 information request.[11] Neither Massey nor McCalla accepted that offer. McCalla did, however, express the Union's preference to bundle all four contracts together during collective bargaining, echoing the Union's position during the 2007 negotiations. Consistent with his response in 2007, Jasinski refused, insisting there was a separate contract for each facility and each should be negotiated separately. He proposed bargaining dates of either March 27 or 31.[12]

In a letter, dated February 21, McCalla responded to Jasinski by agreeing to meet on either day and break out negotiations into separate bargaining sessions for each facility. However, he also proposed to have an initial session with the bargaining committees for all four facilities present in order for union officials to open with their remarks:

> In our discussions concerning bargaining dates you said you have possible availability on March 27 and definite availability on March 31. We request that we use one of those dates to begin bargaining at Alaris Health at Boulevard East, Alaris Health at Castle Hill, Alaris Health at Harbor View, and Alaris Health at Rochelle Park. If we need to move the bargaining session for a different facility tentatively scheduled for the 31st, so be it. As you know the four Alaris contracts expire on the March 31, 2014 and we've yet to receive any response to information requests sent to the facilities on December 27, 2013. We believe it's important to start bargaining before the contracts expire as it's our desire to reach contract settlements in these facilities as quickly as possible.
>
> While we understand the employer's position on separate bargaining tables for each facility and our agreement to hold four separate meetings on the first day of bargaining we believe it would be advisable to add a fifth initial session with all

[6] GC Exh. 302.

[7] Sec. 17(c) of the agreement, entitled "Negotiations," stated that the "Union negotiating committee, not to exceed six (6) Employees, shall be paid for up to three (3) negotiating sessions, by the Employer, at straight time rates, for all lost time from work."

[8] Notwithstanding the CBA's limit of 6 employees on the bargaining committee, there is no evidence that Rochelle Park objected to the Union's designation of 7 employees.

[9] McCalla knew that none of the Alaris facilities maintained 401(k) plans at the time of the previous negotiations but credibly explained that it was a standard request that was made in the event that one was created during the term of the expired agreement. (Tr. 155.)

[10] GC Exh. 303.

[11] There is no dispute regarding Jasinski's assertion as to his past practice of responding to the Union's information requests on the first day of negotiations. (Tr. 2152−2154.) Moreover, his testimony that he told McCalla in January and Massey in February that he would not have an opportunity to delve into the December 27 information request is also undisputed. However, in light of Massey's March 13 email demanding a response, it is clear that the Union never consented to delayed document production until March 27. (Tr. 1994-−995; GC Exh.7; R. Exh. 104.) Jasinski, an experienced labor litigator who defended against the Union's unfair labor practice charges resulting from previous contract negotiations, would have mentioned such an agreement in subsequent written communications. (Tr. 1550−1552.)

[12] Massey conceded that it was Jasinski's longstanding position to negotiate each contract separately, but noted that there were occasions prior to 2014 when the employer agreed to bargain two to four facilities at different times on the same day. (Tr. 926−928.) Jasinski conceded that in 2010 all four contracts were essentially bargained at the same time in the final bargaining session based on an off-the-record meeting involving delegates from all four facilities. (Tr. 1509−1510.)

> facilities and bargaining committees present to give our union leader Milly Silva and counsel Bill Massey an opportunity to address the proceedings before we break into separate sessions. This would obviously be an opportunity for management representatives to speak directly with the employees and Union officials.
>
> Please let us know which of these dates would be your preference.[13]

In a letter, dated February 26, Jasinski confirmed the proposed bargaining dates and agreed to the proposal to have Silva and Massey open with remarks, but insisted they make them at the beginning of each bargaining session for each of the facilities. He also renewed his request for a 90-day contract extension, but made no mention of the December 27 information request:

> We are in receipt of your letter identifying a number of facilities whose contracts expire on March 31, 2014. A brief response is warranted.
>
> Each identified facility is a separate and independent operation with its own collective bargaining agreement covering employees for that particular facility. They maintain separation operations, including all necessary staff. Each facility is unique and the bargaining history at each facility recognizes its independence.
>
> In light of these undisputed facts, we will adhere to our prior practice and not agree to joint bargaining. Of course, Milly Silva and Bill Massey may present the Union's respective positions for each facility at each bargaining session and, quite candidly, we welcome their attendance.
>
> We are available and confirm the March 27 and 31 dates for each facility. Please notify me of the times to commence negotiations for each facility. In scheduling for these sessions, we request notification of the members of the bargaining committee who will be attending. We request these names at least two (2) weeks in advance to avoid any disruption in our staffing. Bargaining sessions, as in our prior negotiations, will take place at the Union's offices in Edison.
>
> Finally, in a spirit of good faith and cooperation, as discussed, we will agree to the extension of each collective bargaining agreement for an additional ninety (90) days. This additional time will afford all parties the opportunity to formulate its bargaining positions and engage in give-and-take at the bargaining table in an effort to reach an amicable agreement that balances the needs of all parties. Should the Union wish to jumpstart the negotiations and submit its initial proposals to us prior to the initial bargaining session, we will accept and review each proposal. Thank you.[14]

On March 13, McCalla emailed Jasinski to inform him that each of the four Alaris facilities would receive releases for bargaining committee members that day by fax and certified mail. Massey followed up with an email later that day regarding the commencement of bargaining and the outstanding information requests:

> This is to follow up on Ron's correspondence below concerning the start of bargaining with the four Alaris facilities. As you are likely aware, on December 27, 2013, the Union, via Vice-President Clauvice St. Hilaire, served information requests on the four Alaris facilities, copies of which are attached hereto for your convenience. Clauvice requested that the sought after documents be produced to the Union by January 24, 2014. We are now in March, only a couple of weeks away from sitting down to start negotiations, and I understand that none of the four facilities has produced even a single document to the Union. Similarly, I am advised that the facilities have not requested an extension of time nor an explanation for the delay in producing these documents, which are relevant and necessary for bargaining. Please have the four facilities produce the requested information as soon as possible, but no later than March 18, 2014. Please advise your clients to supply information as it becomes available rather than waiting to assemble all the information requested. Thank you for your attention to this matter. Best regards.[15]

2. The March 14 information request

In a letter, dated March 14, Massey followed up on his email to Jasinski from the day before, insisting on a response to the December 27, 2013 information request by March 18. In addition, Massey made a supplemental request for the most current payroll roster, daily schedules from January to December 2013 (to the extent not already covered by the previous request), actuarial plan values, and specific health insurance plan documents. The health insurance documents sought included any relating to summary plan descriptions, costs, terms of coverage, census data reflecting plans selected by employees, actuarial and utilization plan values, and requests for proposals and financial impact related information.[16]

3. The March 27 bargaining session

On March 27, Jasinski arrived at 11 a.m. for the first bargaining session at the Union's offices in Iselin, New Jersey. Massey, McCalla, Saint Hilaire, Silva, and Ozual were present, accompanied by approximately 20–25 employee delegates from the four facilities. Two days were set aside for bargain-

[13] Jasinski's testimony regarding assurances by McCalla about negotiating the contracts separately is consistent with McCalla's documented agreement to do that—subject to an opening statement by Silva at the beginning of negotiations. The assurances of separate bargaining, however, made no mention of the composition of Rochelle Park's bargaining committee. (GC Exh. 5; Tr. 869, 1426–1427.)

[14] GC Exh. 6.

[15] Jasinski's testimony established that he never had an agreement from the Union for an extension of time to respond to the December 27 information request. When asked on direct examination about that request, Jasinski simply lumped that issue in with his interest in a contract extension. (Tr. 1416–1418.) Massey had no recollection of any such conversation, but "could appreciate . . . that it would be difficult to do lots of other work while [Jasinski was] on trial." (Tr. 930–931.) Nevertheless, while corresponding during that time over the logistics and dates for bargaining, Jasinski simply ignored Massey's March 13th reminder to provide the information in advance of the March 27 bargaining session. (Tr. 926, 929–930, 1416–1418; GC Exh. 7.)

[16] This request refined the previous request for monthly work schedules from one that sought daily work schedules. (GC Exh. 8.)

ing. Bargaining was to start with the Castle Hill contract and be followed by negotiations over the Harborview, Boulevard East, and Rochelle Park contracts.

After waiting about an hour for Gold to arrive, Jasinski agreed to start the Castle Hill negotiations. Milly Silva and Massey opened with brief opening remarks. After reviewing the sign-in sheet, Jasinski protested the presence of employee-members from Harborview, Boulevard, East and Rochelle Park. He proclaimed Castle Hill's readiness to commence Castle Hill negotiations, but noted each contract was different and the parties had not previously engaged in joint bargaining. Massey replied that the Union was entitled to bargain with a team of its choosing. Jasinski disagreed, accused the Union of playing games and was prepared to leave if employees from the other three facilities did not leave. Massey asked him to reconsider and reiterated that the Union was entitled to pick its own bargaining team. At that point, Jasinski provided a packet of information relating to Castle Hill's December 27 information request and retreated to a caucusing room.[17]

Shortly thereafter, Massey and McCalla went to speak with Jasinski. They asked him to relent, but neither side budged over the composition of the Union's bargaining committee. That conversation ended when Gold arrived and Jasinski asked to confer with his client. A few minutes later, Jasinski and Gold returned to the negotiation room. After confirming the Union's continued position regarding the composition of the bargaining committee, Jasinski said that they would leave. At no point during this meeting did Jasinski assert confidentiality concerns as a reason for excluding employees from the other Alaris facilities during Castle Hill bargaining sessions.

The parties then discussed future dates for bargaining and Jasinski provided Massey with packets responsive to the December 27 information requests by Harborview, Boulevard East, and Rochelle Park. The cover letter in each packet conveyed Jasinski's view that the Union previously requested the information:

Enclosed please find a copy of the requested information. As you will see, much of the information was already in the position of the Union and available to the Union via its members. We are glad to provide you with another copy. Should you have any additional questions or require additional information, please advise.[18]

Before Jasinski and Gold left, the Union did not submit a proposal.[19] Silva did, however, ask about rumors that Boulevard East would be demolished to make way for apartment building development. Jasinski replied that the Boulevard East question did not apply to the Castle Hill negotiation, while Gold said that there was nothing to report. Jasinski said he would get back to them about Boulevard East. Shortly thereafter, Jasinski and Gold left and did not return in order to commence bargaining over Harborview, Boulevard East and Rochelle Park.

In a letter, dated April 1, Jasinski proposed dates for the resumption of bargaining for the Rochelle Park contract:

> After the abbreviated March 27th bargaining session, I want to reiterate that we are available to meet on April 1st, 2nd and 3rd to continue negotiations for the referenced facility. We understand that the Union did not believe it was prudent to meet on any of those dates since it needed additional time to review information. In light of the upcoming religious holidays, we confirmed that we are available on April 28th and 29th, and also offered April 30th and May 1st to meet on any one of those dates for this facility. We believe that it is best to dedicate one of these days for this facility only and not piggyback any other negotiations for the designated dates. The employees deserve our undivided attention. Unfortunately, despite our admitted avai1ability, the Union has not confirmed any of those dates at this time.
>
> If the Union is interested in meeting to continue negotiations at this facility, we ask that you confirm one of those dates for this facility. In addition, if you are interested in moving the negotiations forward, if we receive your written proposal prior to our next session, it will give us the ability to review it and prepare a response and to continue good faith bargaining.
>
> Finally, we again express our willingness to extend the current collective bargaining agreement for an additional period of time to afford the parties the opportunity to continue negotiations in good faith, and seek to reach an amicable resolution that balances the needs of your members with the facility and the care for our residents. Thank you.[20]

In his reply later that day, McCalla documented the parties' March 27 meeting, disagreed with the four facilities' "refusal to hold bargaining sessions for more than one facility per day" as "unreasonable and a poor use of the time and resources of all parties." Notwithstanding Jasinski's position, McCalla proposed to commence separate bargaining dates for each facility as follows: Castle Hill on April 28; Boulevard East on April 29; Rochelle Park on May 1; and Harborview on May 2:

> As discussed on March 27, we reiterate that your clients' refusal to hold bargaining sessions for more than one facility per day is unreasonable and a poor use of the time and resources of all parties. That said, assuming the Employers have not reconsidered on this issue, the Union confirms our agreement from last week to bargain on April 28 and April 29, we accept your offer to bargain, on May 1, and we offer May 2 for a fourth session. We propose the following sequence: . . .[21]

4. The Union's follow-up request

In a letter to Jasinski, dated April 9, Massey expressed concern over the facilities' failures to provide the Union with the information described in items 10, 11, and 12 of the December

[17] I credit Jasinski's undisputed testimony that some delegates in attendances made side remarks, sneered, and laughed, but not his conclusion that their conduct made it "not conducive to bargaining." If that were true, Jasinski, an experienced labor litigator, would have raised that as a concern. He made no mention of their conduct as he walked out. (Tr. 80−83, 870−872, 1432−1434.)

[18] GC Exh. 304.

[19] Rochelle Park notes the discrepancy in testimony between Massey and Saint Hilaire as to whether the Union was prepared with proposals if the bargaining sessions had gone forward. (Tr. 938, 1059.)

[20] GC Exh. 305.

[21] GC Exh. 11.

27 request, and items 2, 3(b), (c), and (e) through (1) of the March 14 request. In addition, Massey noted that the responses to items 14 and 15 of the December 27 request and item 3(a) of the March 14 request were incomplete. He asked for the outstanding information to be provided by April 15.[22]

On April 21, Jasinski responded by reminding Massey that "each facility is separate and we provided separate information for each facility. In the future, we request that any inquiry be addressed for the individual facility." In response to items 10 and 11, Jasinski stated that there were no documents because the facility had not used agency personnel to perform bargaining unit work. Item 12 was noted to be voluminous and Jasinski proposed that the Union "accept a representative sample of work schedule[s] for a limited period of time." As to items 14 and 15, Jasinski referred Massey to the employee handbook.[23] In a separate letter dated the same day, Jasinski responded to the Union's March 14 supplemental request by noting that items 1 and 3 were previously provided, while item 2 was burdensome and unnecessary. Jasinski requested the Union to refine it to one not as overbroad.[24]

5. The May 1 bargaining session

The parties subsequently agreed to resume the Rochelle Park contract negotiations on May 1. Prior to that session, the Union undertook a propaganda blitz in a flier distributed to the employees at the four facilities:

> At our first bargaining session on Thursday, March 27th, we came prepared to bargain with management at each of our four facilities. But management refused to sit face to face with our full bargaining team to discuss their proposals. They want to divide us and weaken us, but we won't let that happen! We won't wait years for a new contract! For more information, contact your organizer, Christina Ozual at [xxx-xxx-xxxx]. The next negotiations are scheduled for Monday, 4/28 and Tuesday, 4/29. Let's all be ready to stand strong and speak with one voice![25]

At the May 1 bargaining session, Jasinski and Gold met with Massey, McCalla, Silva, Saint Hilaire the bargaining committee members from Boulevard East. This time, there was no controversy regarding the composition of the Union's bargaining team. Massey reminded Jasinski that the Union was still waiting for the CNA daily work schedules and health insurance related information. In response to Jasinski's letter asserting the 12-month request was burdensome, Massey previously agreed during the April 28 Castle Hill negotiations to accept 3 months of daily work schedules. Jasinski told Massey at the time that he would get back to the Union regarding the requests. At this meeting, however, Jasinski changed the subject to information he requested from the Union's national pension fund. Massey had no information about that issue. The Union then provided Rochelle Park with its initial written proposals.[26]

6. The employee schedules

In a letter, dated May 14, Jasinski furnished Massey with the monthly staffing schedules at Rochelle Park for each floor for all shifts from February to April. The monthly schedules reflected projected CNAs' work schedules and floor assignments.[27] On May 21, Jasinski responded to Massey's additional information request:

> In response to your additional information request, we have provided you with all relevant information. Most recently, we supplemented our initial response with schedules for this Facility. The additional information which you have requested is simply without merit. You are well aware of this fact, since similar information was requested when the SEIU responded that the information was not available, since it would be a violation of HIPAA.[28]
>
> It is disconcerting that the Union now requests information which it has previously been unable or refused to provide in negotiations. It was either an oversight or, worse, disingenuous, to make these requests.
>
> We are prepared to continue to negotiate a collective bargaining agreement that balances the interests of our employees and your members with those of the Facility. Should you have any other questions, please advise.[29]

The parties met again for bargaining on June 12. Massey again opened with a statement that the information provided in response to the Union's request was not satisfactory because it lacked the requested health insurance information and consisted of projected monthly schedules instead of work schedules reflecting actual work performed by CNAs.[30] Jasinski did not reject the request for additional health insurance information, but suggested it would be unnecessary if the Union accepted Rochelle Park's proposal. As for the work schedules, he insisted that the insisted that the monthly reports were sufficient. Massey explained the relevance of the daily work schedules, which reflect the days and shifts actually worked. After engaging in bargaining, Jasinski provided and explained Rochelle Park's counterproposals.[31]

7. The July 16 bargaining session

McCalla filled in for Massey as the Union's chief negotiator at the next bargaining session on July 16. The session opened, as usual, with the Union's request for daily work schedules and

[22] GC Exh. 21.

[23] GC Exh. 306.

[24] GC Exh. 307.

[25] GC Exh. 44.

[26] The Union does not dispute that, notwithstanding Rochelle Park's failure or refusal to provide necessary information requested on December 27 and March 14, it was still able to submit a fairly comprehensive proposal. (GC Exh. 326 at 5−9; R. Exh. 302; Tr. 1943, 3137−3138, 3146, 3274.)

[27] GC Exh. 308.

[28] During the hearing, Jasinski sought to undermine the Union's need for health insurance information based on the lack of health or safety-related grievances filed and focused on several CBA provisions: Sec. 8 (grievance and arbitration procedure); and Sec. 29(c) (Health and Safety Committee whose purpose "shall be to identify and recommend preventative measures where appropriate").

[29] GC Exh. 309.

[30] Saint Hilaire and Ozual credibly testified that Rochelle Park employees complained to them about short-staffing and health insurance issues prior to bargaining. (Tr. 1008−1009, 1054, 1208−1210.)

[31] GC Exh. 326 at 10−15.

health insurance information needed for bargaining. Once again, Jasinski disagreed, insisting the Union already had the information and did not need anything further. McCalla reiterated the request for the additional information, stressing that it would be unable to enter into a new agreement without it. During the bargaining that ensued, Jasinski dismissed the Union's staffing proposals based on the CBA's management-rights clause reserving it unilateral control over staffing. The parties then engaged in bargaining, with Jasinski providing Rochelle Park's latest contract proposals.[32]

On July 30, Jasinski replied to the Union's continuing request for health plan information and employees' daily schedules:

> We want to be clear and avoid any misunderstanding regarding your multiple information requests. The Employer has been fully responsive. The latest request purportedly asked for supplemental information for the Employer's health plan which was nothing more than harassment, grounded in bad faith, and not intended to facilitate contract negotiations. It is intended to only stall negotiations. We are not about to allow that to happen. At the negotiations, we informed you that the Employer is not in possession of such information and/or the Union is requesting confidential information. We reiterated, at the bargaining table, it is irrelevant, unnecessary and not intended to facilitate contract negotiations.
>
> In addition, the Union requested information concerning work schedules at this facility. We provided the Union with the master list which represents our work schedules. This is the only relevant information, and it was provided.
>
> As stated across the bargaining table, the Employer will neither waive nor modify its rights as set forth in the Managements Rights clause of the collective bargaining agreement. Staffing has historically been a right reserved to this administration, and we will not give-up in this contract negotiation our unilateral right to determine staffing at this Facility. We will reject any Union proposal that modifies our rights concerning staffing levels on the units and the way we staff this Facility. That is our final position and we will not deviate from it.
>
> Once again, we suggest the Union focus on the negotiation of a new collective bargaining agreement for our employees. We are puzzled with the Union's refusal to meet or provide, dates for parties to bargain in good faith. We reiterate our request for new dates to continue to negotiate.[33]

8. The August 27 bargaining session

The parties' final bargaining session was on August 27. Massey reiterated the Union's need for the outstanding daily work schedules and health insurance information for bargaining. Jasinski did not respond to that inquiry and the parties engaged in bargaining.[34]

[32] GC Exh. 326 at 16−19; R. Exh. 306 at 5−6.
[33] GC Exh. 310.
[34] GC Exh. 326 at 20−25.

C. Employees Prepare for a Possible Strike

Article 5(A) of the CBA provides for access by union officials to employees at Rochelle Park under certain conditions. It states, in pertinent part:

> The Union's Business Representatives or the Union's designees, shall have admission to the facility covered by this Agreement to discharge their duties as representatives of the Union, provided such privilege is not abused. . . The Union shall be permitted to conduct Union meetings on the Employer's premises, provided the same are conducted at reasonable times and places, are of reasonable duration, and do not interfere with the normal operations of the Employer."[35]

Beginning in March, Ozual or Saint Hilaire met periodically with employees in the Rochelle Park employee break room. They provided contract education, bargaining updates, and listened to their complaints. The bargaining updates included the significant issues involving in bargaining such as health insurance coverage, pension plan funding, staffing, and the rumored demolition of Boulevard East. Ozual and Saint Hilaire also informed employees about Rochelle Park's refusal to meet with the Union's bargaining committee on March 27 and its refusal to provide requested information.[36]

By May, the Union recommended that employees step up the pressure on the four Alaris facilities. Sometime in June, about 10 employees engaged in informational picketing outside Rochelle Park. During that event, employees carried placards advocating the issues that had arisen during the bargaining process with Rochelle Park.[37]

Thereafter, the Union gradually increased the public pressure. In July, the Union's New Jersey communications coordinator, Bryn Loyd-Bollard, created "Alarisk.com," a website devoted to the Union's bargaining campaign against the four Alaris facilities. The website's home page included a news alert providing the economic motives behind a potential strike:

> NEWS ALERT: HUNDREDS OF HEALTHCARE WORKERS STRIKE AFTER CONTRACT TALKS SOUR.
>
> Don't put your health at alarisk.
> Stand up for quality care and good jobs in nursing home.
> Stand with nursing home residents, families and caregivers and tell the owners of Alaris Health (formerly Omni Health Systems) to settle a far contract that protects patients and workers.
> Despite making $41 million in profit in 2012, many Alaris nursing homes suffer from substandard staffing levels while hardworking caregivers live in poverty. The overwhelming majority of Alaris nursing home employees earn less than $25,000 a year, and some have to rely on public assistance just to make ends meet.

[35] GC 302 at 4.
[36] It is undisputed that Ozual, accompanied occasionally by Saint Hilaire, followed a similar practice of updating employees, as well as receiving their complaints, at each of the four Alaris facilities. (Tr. 1003−1011, 1012−1013, 1158−1187, 1206−1207.)
[37] Only two partial photographs were provided from this event on an unspecified date. (GC Exh. 315(a)-(b); Tr. 2934−2936.)

> Our communities depend on skilled caregivers to provide for our loved ones in their times of need. They deserve better. We deserve better.[38]

On July 23, Silva convened a press conference in Jersey City near Alaris' corporate headquarters. There were elected officials and approximately 10 employees from Alaris facilities in attendance. In prepared remarks that followed, Silva excoriated Alaris for a mélange of reasons as justification for a possible future strike, including unfair labor practices and regressive economic proposals.

> We are here today because Alaris Health, the multimillion dollar for-profit nursing chain based here in Journal Square, is showing a callous disregard for the wellbeing of the communities in which they operate.
>
> The owners of Alaris are violating the rights of its employees, they are raking in huge profits while maintaining substandard staffing levels, and they are planning to demolish one of their long-term care facilities without being forthright to the nursing home's residents or caregivers about their plans. We are here to demand that Alaris start acting responsibly.
>
> The women and men standing beside me play a critical role as caregivers to some of the most vulnerable people in our communities. It is essential that their rights and dignity as workers be upheld, because there is a connection between the quality of life of caregivers and the quality of care for patients.
>
> It is of grave concern to us that Alaris has committed numerous unfair labor practices and continues to act in the same disrespectful and illegal manner as they did five years back, when they operated under the name Omni Health Systems. We do not want a repeat of 2009, when hundreds of nursing home workers had no choice but to go on strike in order to protect standards for good jobs and quality patient care. Omni may have changed their name to Alaris, but it seems that they haven't changed their ways.
>
> After nearly four months and 16 bargaining sessions, 450 caregivers at four Alaris Health nursing homes are still working under expired contracts. All they are asking for are the basics to make ends meet—something that must be insisted upon for every healthcare worker who, as a fundamental requirement of her job, needs to remain physically and mentally healthy.
>
> Yet instead of moving forward, Alaris wants to further erode job standards in nursing homes. They're asking low-wage workers, who earn less than $23,000 a year full-time, to pay even more for health insurance and to reduce critical benefits including sick leave. Many workers already have no choice but to enroll in public assistance just to get their children the healthcare they need, and the concessions that Alaris is seeking will only make the situation worse.
>
> We will not let vital healthcare jobs suffer so that Alaris, which makes $40 million in profit a year, can walk away with even more.
>
> It is disgraceful that Avery Eisenreich, the principal owner of Alaris, which receives literally hundreds of millions of dollars in Medicaid and Medicare funding each year to provide care to the elderly and vulnerable, decides to pocket millions for himself before making sure that the caregivers who work directly with patients have what they need to get by.
>
> Avery has also failed to address persistent staffing shortages at these four facilities, each of which have certified nursing assistant staffing levels below both state and national averages. Our union has proposed a framework for addressing staffing shortages, but management has for months failed to provide the union with requested information on staffing and has refused to negotiate over this critically important issue.
>
> And in Guttenberg, where Avery Eisenreich owns a facility on Boulevard East that is home to 100 elderly and frail residents, he plans to demolish the nursing home in order to build luxury high-rise apartments. He is not being upfront about what his plans are, and the nursing home's residents, their family members, and workers have been left in the dark. This is incredibly disrespectful to everyone who depends on Boulevard East, either as a patient or as an employee.
>
> In many ways, Alaris is acting in complete disregard for the community. We are here today to say that enough is enough. We do not want to strike. Our members would rather be doing the job they love and caring for their residents instead of walking the picket line. But they are ready to strike if they have to, to protect quality care and good jobs.
>
> I'd like to introduce you to a few members of 1199, who work at Alaris nursing homes in Hudson and Bergen counties. They have been working very hard these past months to win a contract that respects their dignity as caregivers and as providers for their own families.[39]

Jasinski knew about the Union's July 23 press conference and discussed that event with Alaris corporate officials.[40]

D. Unit Employees Decide to Strike

On August 27, Massey, Silva, McCall, Ozual, and Saint Hilaire met at the Union's office in Iselin, New Jersey, with ten employee delegates from Harborview, Boulevard East, and Rochelle Park. Another six employees from Castle Hill participated by telephone. Maxsuze Predestin, Deloris Alston, Jean Fritz, and Jamir Gaston were the delegates from Rochelle Park.

The union officials met with the employees for about 1-1/2 hours. McCalla laid out a case for a strike based on the Union's inability to make significant headway in negotiations and the wide gap between proposals. Massey followed with a recitation of the unfair labor practice charges filed for the four facilities and the complaints that he expected to be filed by the Board in September. He also provided an explanation of the difference between an economic strike and a strike premised on unfair labor practices.

Massey then proposed a resolution setting forth the reasons

[38] GC Exh. 48.

[39] GC Exh. 57.

[40] Jasinski conceded that Alaris officials were provided with the details. (Tr. 1536−1538.)

for going out on strike. At the conclusion, the employee delegates present voted to deliver 10-day notices to engage in a 3-day strike. The group discussed and decided who would deliver the notices along with McCalla. The delegates were also instructed to tell the membership that the strike was authorized and it was motivated by economic and unlawful practice reasons.[41] The employees present signed the resolution and the six employees participating by telephone from Castle Hill voiced approval:

> At a meeting of the Alaris Bargaining Committee of 1199 SEIU United Healthcare
> Workers East ("the Union"), held at the Unions office in Iselin, NJ on August 27, 2014, upon the recommendation of Executive Vice President Milly Silva, the following resolution was considered and adopted by the undersigned Committee members:
>
> WHEREAS, 1199 SEIU United Healthcare Workers East is the collective bargaining representative of bargaining unit employees of Bristol Manor Health Care Center, Castle Hill Health Care Center, Harborview Healthcare Center and Palisades Nursing Center, all affiliates of Alaris Health (collectively, "the Employer"); and
>
> WHEREAS the Union has bargained in good faith with the Employer to negotiate a collective bargaining agreement; and
>
> WHEREAS, the Employer has Violated our rights by committing Unfair Labor Practices, specifically by failing and refusing to provide information requested by the Union that is needed for bargaining (especially health insurance and staffing information), unduly delaying in providing other information, and unlawfully interfering with the composition of the Union's bargaining committee and
>
> WHEREAS, Region 22 of the National Labor Relations Board has informed the Union
> that a Complaint against the Employer alleging multiple Unfair Labor Practices in connection with this unlawful conduct is forthcoming; and
>
> WHEREAS, the Employer has continued to make unreasonable bargaining demands of the Union and its members; and
>
> WHEREAS the Employer has continued to commit additional Unfair Labor Practices, including by unlawfully polling and coercively interrogating Union members, and threatening Union members with adverse employment consequences for engaging in protected Union activity; and
>
> NOW, THEREFORE, BE IT RESOLVED THAT: the Union and its members hereby determine to serve the Employer with the legally required ten-day notice of intent to engage in a rally and vigil at Castle Hill Healthcare Center on or about September 10, 2014, in response to the Employer's ongoing Unfair Labor Practices and unreasonable bargaining position; and
>
> BE IT FURTHER RESOLVED THAT: the Union and its members hereby determine to serve the Employer with a subsequent legally required ten-day notice of intent to engage in a strike, for three days at each facility, in response to the Employer's ongoing Unfair Labor Practices and unreasonable bargaining position.[42]

In a letter, dated August 29, Jasinski decried the Union's justification in moving towards a strike, noting that it had been approximately 2 months since the parties' last bargaining session. He referred to his request at the conclusion of their last session for future bargaining dates, but the Union never proposed any. At this point, Jasinski suggested the parties resume negotiations during the weeks of either September 8 or 15. He concluded by attributing the standoff to the Union's continuing request for 'irrelevant and unnecessary" information, and the Union's attempts to resurrect staffing proposals that were previously resolved.[43]

On September 6, Predestin, accompanied by approximately 15 coworkers, delivered to Giles the contractually required 10-day notice of bargaining unit employees' intention to go out on strike for 3 days:

> Notice is hereby given, pursuant to section 8(g) of the National Labor Relations Act, that 1199 SEIU United Healthcare Workers East, New Jersey Region and the employees it represents intend to conduct a strike and picketing at Rochelle Park (Bristol Manor) located at 96 Parkway, Rochelle Park, NJ 07662. The strike and informational picket are to protest the Employer's ongoing Unfair labor Practices and the Employer's unreasonable bargaining demands. The strike will commence at 7:00 AM on Wednesday, September 17, 2014 and end at 6:59 AM on Saturday, September 20, 2014.[44]

Such action had been submitted to the membership for a vote in past years, as required by the Union's constitution.[45] In this instance, delegates Predestin, Gaston and Marie Moise communicated that determination to coworkers and explained that the strike was precipitated by Rochelle Park's bargaining posture and unfair labor practices.[46]

On the same day, Jasinski emailed Massey, questioning the Union's motives and cancelling proposed bargaining dates in

[41] Art. IV, sec. 7 of the Union's Constitution gives delegates the "responsibility of involving their members in all affairs of the Union. Art. V, Sec. 6(b) states the rights of members '[t]o vote on all strike calls and strike settlements directly affecting the members as employees. Article VII, Section 11(1)(f) states that the'" Regional Delegate Assembly shall have the power to call strikes in its region, subject to the approval of the members directly involved and the executive council. (R. 106.)

[42] It is undisputed that the strike resolution was not disseminated to the entire union membership for a vote as required by the Union's constitution. (GC Exh. 15.)

[43] GC Exh. 311.

[44] GC Exh. 312.

[45] Rochelle Park correctly notes that a membership strike vote was not conducted in accordance with the Union's constitution. However, the vote of the delegates was subsequently ratified by the membership's actions in going on strike and Rochelle Park failed to cite any CBA or other legal provision supporting the notion that the delegate's strike vote was null and void or that it even has standing to raise such a procedural objection. (R. Exh. 106 at 5−7.)

[46] This finding is based on the credible testimony of Predestin and Gaston. (Tr. 2937, 2958, 3080−3081, 3091−3092.)

September in order for his clients to dedicate their "time, effort and our resources to ensuring the strike contingency plan at each Facility that received a strike notice is in place and fully operational."[47]

E. The Union Mobilizes Employees

Around the same time, the Union began mobilizing employees for the strike. Saint Hilaire and/or Ozual met with Rochelle Park employees 2−3 times a week in the break room to answer employees' questions and rally support for the strike. In doing so, they distributed informational flyers and addressed concerns regarding Rochelle Park's alleged unfair labor practices, including the failure to provide requested information.[48] They also explained that the strike was motivated by the desire to pressure Rochelle Park to agree to their contract proposals and put a stop to its unfair labor practices.[49]

In some instances, Ozual encountered employees reluctant or disinclined to participate in a strike. An aggressive organizer committed to the execution of the Union's strike strategy, Ozual was not one to take no for an answer. As a result, several employees complained to Giles about their treatment by Ozual. She was accused of yelling, using foul language and straying from the break room and harassing employees whom were reluctant to participate in the strike. In one instance, Giles heard Ozual engaged in heated argument with employees in the lobby. She was loud, angry, and confrontational. In response, Jasinski sent a letter to McCalla, dated August 29, detailing the aforementioned disruptive conduct. He referred to previous communication relaying Rochelle Park's concern to the Union and the latter's assurance that the conduct would be corrected. Notwithstanding the warnings to Ozual, her disruptive conduct continued. As a result, Jasinski concluded:

> We cannot and will not allow this behavior to continue. Ms. Ozual has, by her actions, forfeited the right to enter the Alaris at Rochelle Park Facility. She will no longer be allowed to enter this Facility. If any other Union representatives engage in similar behavior, we will likewise exercise any and all rights and remove that individual who exhibits no respect for the Facility and the care we provide to our residents. While we recognize and respect the Union's right to represent its members, we expect nothing less than the same respect, recognizing the rights of the Facility and care for our Residents.[50]

Sometime in late August, after Jasinski's August 29 letter, Ozual went to meet with Rochelle Park employees. She signed in and went to the break room to meet workers on break. Within minutes, an unidentified individual came in and said Ozual needed to leave. She refused and Giles and German came shortly thereafter and ordered her to leave. Ozual insisted she was entitled under the contract to meet there with employees. A short while later, the police came, ordered Ozual to leave and she complied.[51]

F. Supervisors Statements Prior To The Strike

Rochelle Park's management did not stand idly by as the Union mobilized employees. In August, Dietary Director Arlene Concepcion called employees into her office for individual meetings during work time and asked if they were going to go on strike. Pot washer Rodley Lewis said he was undecided. When asked, however, dietary employee Gaston said that he was going to go on strike. Concepcion replied that the last strike did not result in the dietary department delegate getting the same benefits as everyone else. She also warned that Gaston risked being replaced and losing his full-time position. In September, Concepcion followed up the individual meetings by convening dietary staff in the kitchen and asked again if they were going to go on strike. No one responded.[52]

Concepcion subjected dietary staff to another group meeting in the kitchen in September, but this time along with housekeeping director Peter German. German asked the employees if they were going to strike and noted the risk of job loss if they did. Concepcion expressed hope that employees would not lose their jobs, but it was their choice.[53]

German made similar statements to housekeeping employees during a group meeting that he convened in late August or early September. He warned staff that the strike would not end well for striking employees and they would be replaced. German reinforced those remarks in a conversation with dietary employee Julieta Dominguez a few days before the strike. He approached her at work and asked if she intended to strike. Dominguez replied that she would go out on strike. German said okay and walked away.[54]

Several days before the strike, supervisors summoned employees to Giles' office, where they lined up outside. One by one, employees entered and were asked by Giles if they planned to go out on strike. Dominguez replied that she was going to go on strike, whereby Giles tersely concluded the conversation: "that's it." After the interrogation procession, Giles followed up by confronting approximately 50 individual employees as they worked, asking Dominguez, Gaston, and others

[47] R. Exh. 8.

[48] GC Exhs. 44(c), (e) and (f); R. Exh. 4−5.

[49] This finding is based on the credible and undisputed testimony of Ozual and Saint Hilaire. (Tr. 1013−1029, 1176−1186, 1190−1192, 1206−1212, 1216−1219, 1276−1286, 1315−1306.)

[50] R. Exh. 304.

[51] Although I credited Ozual's corroborated testimony regarding other union activity at Rochelle Park, I did not credit her denial that she engaged in disruptive behavior within the facility. (Tr. 3081−3083, 3177−3180, 3194−3199, 3310−3314.) I based that assessment on my observation—which I stated on the record—of Ozual violating my instruction not to speak with other witnesses during breaks outside the hearing room. That defiance strongly suggests an aggressive intolerance towards the opposing views of others. (Tr. 2580.) As such, I credited Giles' testimony, corroborated by Jasinski's letter, regarding several altercations between Ozual and employees during the month prior to the strike. (Tr. 3207−3208, 3213−3218, 3230−3233.)

[52] The credible testimony of Lewis and Gaston was undisputed. Neither Concepcion nor German, still employed at Rochelle Park, testified. (Tr. 2899−2902, 2928−2930, 2932−2934.)

[53] Again, Gaston's credible testimony was undisputed. German did not testify. (Tr. 2932−2934.)

[54] This finding is based on the credible and undisputed testimony of housekeeping employees Dominguez and Jacinta Hormaza. (Tr. 3010−3012, 3014−3015, 3045−3047.)

how much the Union would pay them during the strike.[55]

Lastly, Giles distributed a flyer to Rochelle Park employees explaining their rights and the ramifications of going out on strike, and responding to the distortions and misrepresentations of "The Truth" by the Union. It stated, in pertinent part:

> A strike does not unite people and hurts all involved, including those who chose to walk away from their jobs. A strike will not get us a collective bargaining agreement nor will it change terms of the contract. it will only result in the possibility of lost wages and benefits for those who choose to voluntarily participate . . . History at our facility has proven that a strike will not impact the fair negotiations for a contract and only results in the possibility of lost wages and benefits for those [sic] choose to voluntarily participate.
>
> The Union claims "All members who go out on strike – including all part-timer and per-diem workers – are eligible for strike benefits . . . Strike benefits, should you receive any, may not cover your lost wages and benefits. Employees who went on strike in 2009 were not paid and never recovered what they lost while out on strike.
>
> The Union claims that "In the history of our union, 1199 SEIU, no healthcare employer has hired permanent replacement workers when workers have gone on a short strike . . . Once a strike is over, you may not be able to immediately return to your job. That is a fact. Moreover, the Union does not tell that . . . several times SEIU called a strike at non-Alaris facilities where the employees trusted SEIU and its officials. However, as was their right, these Employers sometimes permanently replaced those employees.[56]

G. Alaris Supervisors Observe Employees During Prayer Vigil

On September 10, employees from all four facilities participated in a prayer vigil and rally with Silva and their local State Assemblyman in front of Castle Hill.[57] Flyers distributed to employees at the four facilities prior to the vigil referred to the upcoming strike relating to the facilities' unfair labor practices and undermining of job standards.[58] During the event, Castle Hill administrator Maurice Duran stood about ten feet away. He could be heard saying that their action was a joke, there was nothing to worry about, it was just bad publicity, and it would not be a problem to do what he had to do next.[59] The Union photographed the rally/vigil and depicted it in a flyer distributed on September 15.[60]

H. Alaris Prepares for the Strike

In anticipation of its staffing needs prior to the strike, Rochelle Park entered into contracts with two temporary staffing companies. Included in the agreements with Tristate Rehab Staffing and Towne Nursing were requirements that that Rochelle Park retain their employees for minimum terms of four weeks. This was a peculiar development in light of the Union's prior notice of a 3-day strike.[61]

I. The Strike

Massey did not speak with Jasinski about the strike beforehand, but sent him an email and voice mail on September 15. On the same day, Jasinski called McCalla and requested he alert employees not to walk off early because it could leave the facilities understaffed and compromise their licenses.[62]

On September 17, approximately 15−20 Rochelle Park employees/unit members ceased work and engaged in a strike. The strikers included CNAs Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, SantiaVilceus, and Gabby Youmane, housekeeping employees Julieta Dominguez, Jacinta Hormaza, and Jean Fritz, and dietary employees Jamir Gaston and Rodley Lewis. Fritz, the union delegate, also participated and spoke in a prayer vigil and rally outside Castle Hill that day.[63]

Over the next 3 days, the striking employees picketed outside the facility. The picketers' signs demanded Rochelle Park engage in good-faith bargaining and cease committing unfair labor practices.[64]

During the 3-day strike, Rochelle Park covered the shifts of the striking CNAs with 7 temporary employees from the two staffing agencies.[65]

J. Employees Attempt to Return to Work

On September 18, the second day of the strike, Jasinski informed Massey that some strikers would not be allowed to return to work the next day because of the contractual commitments with the staffing agencies. Massey questioned why the facilities would make such a commitment if employees gave notice of a 3-day strike. Jasinski explained that the facilities needed to be cautious in case the employees changed their minds and remained on strike for a longer period of time. Massey disagreed, noting that the Union's history belied such a concern. In an email sent later that day, Massey, on behalf of all Rochelle Park employees/unit members who engaged in the strike, made an unconditional offer to return to their former or substantially equivalent positions of employment.[66]

On or after September 20, employees who participated in the strike reported to work at Rochelle Park. In accordance with the

[55] Giles did not dispute the credible testimony of Dominguez and Gaston. (Tr. 2931, 3012−3014, 3047−3048, 3221, 3236−3228.)

[56] GC Exh. 319.

[57] GC Exh. 35.

[58] GC Exh. 44(f).

[59] I base the finding regarding the observation of employees on Castle Hill CNA Leanne Crawford's credible and undisputed testimony. (Tr. 489−492.) Although his employment role was limited to Castle Hill, Duran conceded that he is engaged to Alaris official Ann Taylor. (Tr. 1584−1585.)

[60] GC Exh. 44(b).

[61] I credit Jasinski's testimony that he "reviewed" the agency contracts, but not his vague assertion regarding alleged negotiations by unidentified persons which resulted in Rochelle Park agreeing to 4-week terms. (Tr. 2767, 2803, 3282−3283; R. Exh. 11, 305.) Linda Dooley, an Alaris officer who signed the agreements was available, but did not testify, and the circumstances by which the addenda were added were not explored. (Tr. 722, 2636.)

[62] GC Exh. 28.

[63] Fritz did not testify but I based this finding on Silva's credible testimony as to who participated in that rally. (Tr. 998−999.)

[64] GC Exh. 19.

[65] GC Exhs. 336-337.

[66] GC Exh. 28.

procedure previously agreed to between Jasinski and Massey, Rochelle Park provided the Union with a list of those who would be reinstated. Ten employees were not reinstated when they returned to work: housekeeping employees Dominguez and Hormaza; dietary employees Gaston and Lewis; and CNAs Alston, Abellard, Padda, Meronvil, Vilceus, and Youmane.[67]

K. Employees Locked-Out on September 20

1. Rodley Lewis

Prior to the strike, Lewis was employed as a part-time dietary aide on the 7 a.m. to 10:30 a.m. He worked 6 days a week with Wednesdays off. Lewis participated in all 3 days of the strike. He attempted to return to work on September 20, but Giles instructed him, through Saint Hilaire, to return on September 22. Upon returning on September 22, however, Giles met him outside the facility and told him that Concepcion had no work for him, but would call him when there was work available. Rochelle Park has never called Lewis to return to work.[68]

2. Deloris Alston

Alston, a CNA at Rochelle Park for 26 years, worked full time on the 3 p.m. to 11 p.m. shift and regularly worked overtime two Saturdays each month. She was a shop steward for 23 years, attended the 2014 bargaining sessions, participated in the August 27 strike vote session, and served Giles with the Union's 10-day strike notice. Alston participated in all 3 days of the strike and had been on the schedule to work on September 20.

Rochelle Park notified the Union that Alston was to return to work on September 22. She was unable to work that day but returned on September 24, her next regularly scheduled work day.[69] Thereafter, Alston did not work again until September 29 and October 5. On the latter date, she inquired of nursing director Caldona as to her hours. Caldona then met with Moses Adu, the staffing coordinator. A short while later, Adu told Alston that her full-time hours would be restored, but that there would be no overtime for anyone who participated in the strike. Since returning to work, Alston has not received overtime work opportunities.[70]

3. Julieta Dominguez

Dominguez, a full-time housekeeping employee who participated in the strike, worked 5 days per week on the 7 a.m. to 3 p.m. shift, with Tuesdays and Saturdays off. She returned from the strike on September 20, but was not reinstated until September 23. On that date, although her former full-time position continued to exist, she was reassigned to a part-time position working an average of 3 days per week.[71]

4. Jacinta Hormaza

Hormaza, also a full-time housekeeping employee who participated in the strike, worked 5 days per week on the 7 a.m. to 3 p.m. shift. She returned from the strike on September 20, but was not reinstated until September 23. On that date, although her former full-time position continued to exist, she was reassigned to a part-time position working an average of 3 days per week. She asked German why she had been reassigned to a part-time work and he told her that she had been warned that there would be consequences if she went on strike. Hormaza recorded the conversation.[72]

5. Jean Abellard

Abellard, a CNA at Rochelle Park since 2007, worked full-time prior to the strike. He participated in picketing during the 1st and 3rd days of the strike. After the strike, Abellard attempted to return to work on September 20, but was locked out. He was not reinstated to his pre-strike position until October 18.[73]

6. Rajvinder Padda

Padda, a full-time CNA who went on strike for the 3 days, attempted to return to work on September 20. She was told that there were no hours available for her. She was reinstated to her shift on September 28.[74]

7. Evelyn Meronvil

Meronvil, a full-time CNA, also participated in the strike. She attempted to return to work, but was also told that there was no work for her. She was reinstated on October 4.[75]

8. Santia Vilceus

Vilceus, a full-time CNA, participated in the strike. When she returned to work after the strike, she was told there was no work for her. She was reinstated on October 15.[76]

9. Gabby Youmane

Youmane, a full-time CNA, participated in the strike. After the strike concluded, she was informed by Rochelle Park that there was no work for her. Youmane was locked out until she was reinstated on September 29.[77]

10. Jamir Gaston

Gaston, a full-time dietary aide, served as a union delegate, attended the 2014 bargaining sessions and participated in all 3 days of the strike. He returned to work after the strike on September 20, but was instructed by Giles to call on September 22. Gaston called on September 22 and was instructed by Concepcion to return to work on September 24. She added, however, that he would no longer work a full-time schedule.

Before the strike, Gaston worked 75 hours per pay period with regular days off. Although his position continued to exist

[67] GC Exh. 323(a).

[68] Lewis' credible version of his strike activity and Rochelle Park's refusal to reinstate him is undisputed. (Tr. 2895−2896, 2904−2908; GC Exh. 313(b).)

[69] Alston was unable to resume on September 22 because the Union did not tell her until the same day. (GC Exh. 318 at 24, 35.)

[70] Alston's credible testimony was undisputed. (Tr. 2991−2992, 2998−2999.)

[71] Dominguez' testimony was confirmed by the payroll records. (Tr. 3025; GC Exh. 323.)

[72] Hormaza's credible testimony was undisputed. (Tr. 3042−3043, 3059−3067; GC Exh. 322−323.)

[73] Interim offers of employment to Abellard to work at other Alaris facilities are left for compliance. (Tr. 3035−3036.)

[74] GC Exhs. 324(c); GC Exh. 318 at 28.

[75] GC Exhs. 318 at 34, 324(d), 325(a), and (e), and 328.

[76] GC Exhs. 318 at 45, 323(a), 324(g), and 329.

[77] GC Exhs. 318 at 30, 323, 324(d) and 325.

after returning to work from the strike, Gaston's hours were significantly reduced. Over the course of the 9 months following the strike, with the exception of 4 weeks, Gaston's work was limited to, at most, 4 days per week.[78]

L. Fritz's Hours Are Reduced

Jean Fritz, a full-time housekeeping employee, served as a union delegate and participated in the 3-day strike. He played a prominent role in the preparations for the strike and during the strike. Fritz also represented Rochelle Park at the August 27 strike authorization meeting and spoke at the Union rally on September 17 in front of Castle Hill.

Prior to the strike, Fritz worked 5 days per week. He was reinstated upon returning to work after the strike. Although his full-time position continued to exist, Fritz' hours were reduced and he worked, at most, 4 days per week after returning from the strike.[79]

LEGAL ANALYSIS

I. ROCHELLE PARK'S OBJECTION TO THE UNION'S BARGAINING COMMITTEE

The complaint alleges that Rochelle Park violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on March 27, 2014 because employee representatives from the other three facilities were present. Rochelle Park contends that its insistence that the Union's bargaining committee be restricted solely to Rochelle Park employees was consistent with past practice. Additionally, Rochelle Park contends that the parties' collective-bargaining agreement limited the Union's bargaining committee to 6 members (or 7, given Rochelle Park's acquiescence to the designated individuals).

Section 7 of the Act guarantees employees and employers the right to "to bargain collectively through representatives of their own choosing" and the Supreme Court has recognized this right as fundamental to the statutory scheme. *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 33 (1937). Generally, both parties have a right to choose whomever they wish to represent them in negotiations, and neither party can control the other party's selection of representatives. *General Electric Co.,* 173 NLRB 253, 255 (1968), enfd. 412 F.2d 512, 516−517 (2d Cir. 1969); *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 177−178 (8th Cir. 1969) (affirming Board determination that "so long as it confines negotiations to terms and conditions of employment within the bargaining unit, it has free rein . . . in its choice of negotiators.")

The right to choose one's bargaining representatives, however, is not absolute. An exception to the general rule arises when the situation is so infected with ill will, usually personal, or conflict of interest as to make good-faith bargaining impractical. See, e.g., *NLRB v. ILGWU*, 274 F.2d 376, 379 (3d Cir. 1960) (ex-union official added to employer committee to "put one over on the union"); *Bausch & Lomb Optical Co*., 108 NLRB 1555 (1954) (union established company in direct competition with employer); *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810 (6th Cir. 1950) (union negotiator expressed great personal animosity towards employer). But cf. *NLRB v. Signal Mfg. Co*., 351 F.2d 471 (1st Cir. 1965) (per curiam), cert. denied 382 U.S. 985 (1966) (similar claim of animosity rejected). On the other hand, where the employer simply asserts that there was ill will and a conflict of interest relative to the proposed union representatives, the Board is unlikely to grant an exception to the presumptive rule that both employers and employees have an unrestricted right to choose their own representative. *Atlas Refinery, Inc*., 354 NLRB 1056, 1070 (2010) (employer "violated § 8(a)(5) and (1) of the Act by refusing to bargain with the Union as long as [the union's designated representative] was part of the bargaining committee").

Mere inclusion of persons outside the negotiating unit does not constitute exceptional circumstances. *NLRB v. Indiana & Michigan Electric Co*., 599 F.2d 185 (7th Cir. 1979) (other units); *Minnesota Mining & Manufacturing Co. v. NLRB*, 415 F.2d at 177–178 (other locals); *General Electric Co. v. NLRB*, 412 F.2d at 517–520 (2d Cir. 1969) (other international unions); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (other locals). Furthermore, a claim that a union's use of outsiders was an unlawful attempt to compel companywide or multiplant bargaining is also insufficient, unless the employer can demonstrate that the union actually attempted to bargain outside unit boundaries *NLRB v. Indiana & Michigan Electric Co.*, 599 F.2d at 191; *Minnesota Mining*, 415 F.2d at 178; *General Electric*, 412 F.2d at 519−520.

In this case, there was no evidence that the Union sought to force Rochelle Park into multiemployer bargaining through the presence of bargaining unit members from the other three facilities. The only hint of a union strategy affecting all four facilities was its desire to have Silva and Massey make opening statements out the outset of bargaining. See *International Brotherhood of Electrical Workers, Local Union No. 46, AFL–CIO*, 302 NLRB 271, 273−274 (1991) (union not justified in refusing to negotiate with employer group's chosen committee of members and nonmembers at the outset of separate bargaining sessions in accordance with a longstanding practice of including all both group members and nonmembers under a single collective-bargaining agreement).

Some delegates in attendances made side remarks, sneered and laughed in response to Jasinski's remarks on March 27. However, Jasinski never mentioned that as an issue on March 27 and it was hardly an indication that the participation of employees from the other three facilities represented a "clear and present danger to the collective bargaining process" or would create ill will and make bargaining impossible. See *International Brotherhood of Electrical Workers, Local Union No. 46, AFL–CIO*, 302 NLRB at 273−274 (union did not meet burden of showing that the employer group's chosen representatives were "so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining").

Jasinski's additional concern at hearing that the presence of employees from other facilities would violate the confidentiality of employees at the other facilities does not pass muster. See

[78] Notwithstanding evidence of replacement workers hired after the strike, the relevant fact is that Gaston's full-time position continued to exist. (GC Exh. 317.)

[79] Rochelle Park's records were incomplete and unreliable, but the available information confirms that Fritz incurred a reduction in work hours of one or more days per week. (GC Exh. 323; Tr. 3074−3076, 3225.)

Milwhite Co., Inc., 290 NLRB 1150, 1152 (1998) (mere fear that negotiations will result in compromising confidentiality is insufficient), citing *General Electric Co.*, 173 NLRB at 255. No such concern was expressed on March 27.

Rochelle Park cites *CBS, Inc*., 226 NLRB 537, 539 (1976), as support for the proposition that the Union's bargaining representatives presented "a clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." That case, however, involved a conflict of interest regarding the composition of a bargaining committee because one committee member was part of a labor organization that did not represent CBS's members, but rather, two key competitors. That is hardly the scenario here. Rochelle Park also cites *Fitzsimons Mfg. Co.,* 251 NLRB 375, 379−380 (1980), for a similar proposition. In *Fitzsimons*, however, an employer lawfully excluded a union representative who engaged in an unprovoked physical attack on the company's personnel director. Id. That scenario was also inapplicable.

Given the absence of evidence of exceptional circumstances indicating bad faith on the part of the Union, Rochelle Park was obligated to bargain with the Union's bargaining committee on March 27 even though employee-members from the other three facilities were present. *General Electric*, 412 F.2d at 520. By walking out of the negotiations under those circumstances, Rochelle Park refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. See *Standard Oil Co. v. NLRB*, 322 F.2d at 44 (employer unlawfully refused to negotiate with union bargaining committee, which added temporary representatives from affiliated bargaining units in order to improve communication between them); *NLRB v. Indiana & Michigan Electric Co*., supra, (employer unlawfully refused to bargain with union negotiating committee because the union was coordinating the various bargaining efforts).

II. ROCHELLE PARK'S DELAY IN PROVIDING INFORMATION

The complaint alleges that Rochelle Park also violated Section 8(a)(5) and (1) when it unreasonably delayed in providing the Union with information requested in order to prepare for bargaining. Rochelle Park contends that it responded in a manner reasonably consistent with past practice and that union officials sanctioned the delay because of counsel's other commitments.

The duty to timely furnish requested information cannot be defined in terms of a per se rule. *Good Life Beverage Co.,* 312 NLRB 1060, 1062 fn. 9 (1993). Rather, what is required is a reasonable good-faith effort to respond to the request "as promptly as circumstances allow." Id. See also *Woodland Clinic,* 331 NLRB 735, 737 (2000). In evaluating the promptness of an employer's response, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *West Penn Power Co.,* 339 NLRB 585, 587 (2003), citing *Samaritan Medical Center,* 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005). Since "information concerning terms and conditions of employment is presumably relevant," it must be "provided within a reasonable time, or, if not provided, accompanied by a timely explanation." *In Re W. Penn Power Co.*, supra at 597 (citing *FMC Corp.,* 290 NLRB 483, 489 (1988)). Even a relatively short delay of 2 or 3 weeks may be held unreasonable. See, e.g., *Capitol Steel & Iron Co.,* 317 NLRB 809, 813 (1995), enfd. 89 F.3d 692 (10th Cir. 1996) (2 week delay unreasonable under the circumstances because the information sought was simple, close at hand, and easily assembled); *Aeolian Corp.,* 247 NLRB 1231, 1244 (1980) (3 week delay unreasonable under the circumstances).

Rochelle Park received the Union's initial information request on December 27 and a supplemental request on March 14. In early January, Jasinski informed Massey and McCalla that he would be busy with a State court proceeding in parts of January and February. The trial eventually took place between early February and the third week in March. Jasinski did propose, on several occasions, to extend the term of the expiring contract, but the Union never agreed. At no time, however, during his written and verbal communications with the Union did he request an extension of time to respond to the information requests. That is because Jasinski always intended to produce a response to the information requests on the first day of bargaining.

Dallas & Mavis Forwarding Co., 291 NLRB 980 (1988), enfd, 909 F.2d 1484 (6th Cir. 1990), cited by Rochelle Park, is inapplicable. In that case, the Board found a delay in providing requested information justified to the extent that the employer's confidentiality interests outweighed a union's need for information. The employer feared that competitors might gain an advantage if they acquired information about tariff rates contained in certain business contracts. In this case, however, Rochelle Park never asserted confidentiality concerns as an excuse for the delay at any time prior to March 27.

The passage of nearly 3 months in responding to the Union's initial information request and 5 weeks responding to the supplemental request was unreasonable. Rochelle Park was entirely mum on the subject notwithstanding follow-up reminders by the Union to provide the information prior to the March 27 bargaining session. Instead, Jasinski simply delivered the information at the conclusion of the March 27 session, just before he and Gold walked out. The tactic was clearly calculated to prolong bargaining by ensuring that the Union would have insufficient time to analyze the information provided and, thus, be unable to commence meaningful bargaining at the first session. The fact that Rochelle Park previously delayed in producing requested information until the first bargaining session does not rescue it from a violation of Section 8(a)(5) and (1) of the Act.

III. REFUSAL TO PROVIDE SCHEDULES AND HEALTH INSURANCE INFORMATION

The General Counsel also contends that Rochelle Park violated Section 8(a)(5) and (1) of the Act on May 21, when it refused to provide daily work schedule information, and July 30, when it refused to provide health insurance related information, both of which were relevant and necessary to the performance of its duties as the exclusive bargaining representative. Rochelle Park refused to provide such further work schedule information, insisting that the Union should be satisfied with monthly master schedules. With respect to the health insurance information, Rochelle Park claimed it was prohibited

from releasing such information under the privacy provisions of the Health Insurance Portability and Accountability Act of 1996.[80]

An employer has a duty to furnish relevant information necessary to union representatives for the proper performance of their duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 153 (1956); *Detroit Edison v. NLRB,* 440 U.S. 301, 303 (1979); *W-L Molding Co.*, 272 NLRB 1239, 1240−1241 (1984); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435−436 (1967); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Whitesell Corp*., 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co*., 344 NLRB 231, 235 (2005).

The standard for establishing relevancy is the liberal, "discovery-type standard." *Alcan Rolled Products*, 358 NLRB 37, 40 (2012), citing and quoting applicable authorities. The Union, in accord with its duty, sought copies of daily work schedules in order to formulate and present appropriate proposals on behalf of employee-members. See *Wayneview Care Center*, 352NLRB 1089, 1115 (2008) (work schedules relating to unit employees, are presumptively relevant, including information on current schedules for each department). Accordingly, the Union was entitled to production of schedules of work actually performed by employees and was not relegated to the monthly work schedules. See *McGuire Steel Erection, Inc. & Steel Enterprises, Inc*., 324 NLRB 221, 223−224 (1997) (employer unlawfully refused to provide additional payroll records on the grounds that it already provided the union with other types of payroll records); *National Grid USA Service Co., Inc.*, 348 NLRB 1235 (2006) (union was entitled to copies of invoices containing base line information, not just unverified summaries made by employer); *Merchant Fast Motor Line*, 324 NLRB 563 (1997) (union was not required to accept an employer's declaration as to profitability or summary financial information provided by the employer); *McQuire Steel Erection, Inc.,* 324 NLRB 221 (summaries of payroll records deemed not sufficient to meet a respondent's statutory obligation).

Similarly, Rochelle Park was obligated to furnish the requested health insurance information necessary for the Union to formulate its own proposal. *One Stop Kosher Supermarket, Inc.,* 355 NLRB 1237 (2010) (union was entitled to health insurance plan information). The Union was entitled to the requested information concerning the costs of health insurance to Rochelle Park and covered employees in order to analyze them within the context of the Affordable Care Act. This was significant information, given the Union's bargaining objective to increase dependent health insurance coverage and its interest in exploring alternative proposals to offset the costs.

On May 21, Jasinski formally denied the union's request for the daily work schedules. With respect to the health insurance information request, Jasinski initially insisted the Union already had the information. That was incorrect. The Union had only been provided with partial information relating to gross payroll benefits, monthly health plan costs, and a summary description of the plan. After the Union persisted, he agreed to inquire further. On July 30, Jasinski closed the door regarding any further health insurance related information. He based that objection on spurious confidentiality concerns that came more than 2 months after the information request. *Exxon Co. USA,* 321 NLRB 896, 898 (1996) (confidentiality objection must be timely raised). Moreover, the documentary evidence and Jasinski's vague testimony failed to identify how any of the requested health insurance related documents involved the confidential medical information of any employees. Lastly, Jasinski refused Massey's offer to work out an accommodation for the release of the allegedly confidential information. See *Castle Hill Health Care Center,* 355 NLRB 1156, 1183−1184 (2010) (generalized confidentiality concern unavailing as an excuse to refuse information request).

Under the circumstances, Rochelle Park's refusal to provide daily work schedule information on May 21 and health insurance related information on July 30 as requested by the Union violated Section 8(a)(5) and (1) of the Act.

IV. THREATS REGARDING STRIKE ACTIVITY

A. Threats to Employees of Job Loss or Other Reprisals

The complaint alleges that Rochelle Park engaged in various violations of Section 8(a)(1) of the Act. The standard in determining whether employer conduct violates that section of the Act is based on whether statements made to employees reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In determining whether a supervisor's statement is unlawfully coercive, the test is whether the employee would reasonably be coerced by it. See *Engelhard Corp.,* 342 NLRB 46, 60−61 (2004) (test for coercion under Sec. 8(a)(1) is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act") (emphasis in original), enfd. 437 F.3d 374 (3d Cir. 2006).

Dietary Director Concepcion issued threats to employees in August and September 2014. First, Concepcion summoned Lewis to her office where she asked him if he planned on striking. Lewis did not explicitly answer. Second, Concepcion questioned Gaston about whether he would strike. Gaston answered that he would strike. In response, Concepcion told Gaston that by striking he risked losing his job and an hour reduction. Finally, a week before the strike, Concepcion questioned several employees about their intention to strike. The employees did not answer and Concepcion threatened termination if the employees participated in the strike.

Like Concepcion, Housekeeping Director German told employees they could be fired for striking on three occasions. First, German threatened a group of employees that they could be fired if they went on strike. At this meeting, housekeeping employees Hormaza and Dominguez were called to the basement by German. German told the employees that if the Union went on strike things were going to get ugly and employees would be replaced. Following the group meeting, German ques-

[80] 45 CFR §§ 160 and 164.

tioned each employee individually about who was planning to strike. Second, German again questioned Dominguez about whether she planned on striking. Dominguez answered affirmatively and German responded by saying okay and walking away. Third, prior to the strike, both Concepcion and German jointly questioned a group of employees whether they planned on striking. At this meeting, German told the employees that they could lose their jobs if they went on strike.

The aforementioned supervisory statements sent clear messages that engaging in Section 7 activity was harmful to Rochelle Park and striking would result in changes of working conditions and hours. See *Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992) (employer's questioning coupled with a veiled threat unlawful where there was no legitimate purpose for ascertaining the employee's prospective union activities). In addition, the threats that a strike will lead to job loss were unlawful because they incorrectly conveyed to employees that their employment will be terminated as a result of a strike, whereas the law is clear that economic strikers retain certain reinstatement rights. *Baddour, Inc.*, 303 NLRB 275 (1991) (mere statement without further explanation that employee "could end up losing your job by being replaced with a new permanent worker" was unlawful).

Under the circumstances, the threats by Concepcion and German, coupled with interrogation, that employees could be replaced and lose their jobs if they participated in a strike violated Section 8(a)(1) of the Act.

B. Interrogation of Employees Regarding Strike Activity

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. In applying the *Bourne* factors, the Board seeks to determine whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000).

During the aforementioned meeting with dietary employees, German questioned employees about whether they planned to strike and that a strike could cause employees to lose their jobs. German did not assure the employees that no reprisals would be taken against them as a result of their responses. Such assurances were necessary given that German was canvassing the facility threatening employees, including the same employees, with termination if they participated in the strike. Under the circumstances, German's remarks were coercive in nature and violated Section 8(a)(1). *Reno Hilton Resorts,* 320 NLRB 197, 207 (1995).

Rochelle Park administrator Kristine Giles also interrogated employees regarding participation in the upcoming strike. She approached Gaston and asked if he was going to strike. When Gaston replied that he was planning to participate in the strike, Giles responded that the strike was futile and asked how much the union would pay him for striking. When Dominguez answered that question affirmatively, Giles responded by also asking how much the union would pay her for striking. A few days before the strike, Giles systematically questioned approximately 50 employees individually about their intention to strike. She did not, however, assure employees during such questioning that no reprisals would be taken against them as a result of their responses. Under the circumstances, Giles' remarks were coercive in nature and violated Section 8(a)(1). *Reno Hilton Resorts,* supra at 207.

Under the circumstances, the questioning by German and Giles was coercive in nature and violated Section 8(a)(1). *Roosevelt Memorial Medical Center,* 348 NLRB 1016 (2006).

V. OZUAL IS REMOVED FROM ROCHELLE PARK

The complaint alleges that Rochelle Park violated Section 8(a)(5) and (1) by failing to bargain over its decision to deny Union Organizer Ozual access to its facility in order to meet with bargaining unit members as provided under the CBA. Rochelle Park contends that Ozual violated the CBA provision requiring the Union's representative to behave reasonably while meeting with employees at Rochelle Park.

The law is well settled that an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). A union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. See, e.g., *T.L.C. St. Petersburg, Inc*., 307 NLRB 605, 610 (1992), enfd. mem. 985 F.2d 579 (11th Cir. 1993). "[A] unilateral change in an employer's policy permitting access by union representatives to its premises is a unilateral change in the employees' terms and conditions of employment and is, ordinarily, unlawful." *Turtle Bay Resorts*, 355 NLRB 1272, 1272 (2010). In addition, a unilateral change in the past practice of permitting union access is a material change about which an employer is obligated to bargain. *Ernst Home Centers*, 308 NLRB 848, 849 (1992).

The credible evidence revealed that Ozual's ejection was preceded by several episodes during August in which she yelled loudly, used foul language, confronted, and harassed employees reluctant to participate in the strike. The incidents occurred outside the break room and Rochelle Park reasonably considered them disruptive enough that Jasinski wrote to McCalla on August 29 to inform him that Ozual was banned from the facility. He premised the decision on past discussions with the Union, but there was no evidence that those discussions amounted to bargaining over the issue.

The Board has held that where an employer unilaterally denies or reduces the union's ability to access unit employees for purposes of representation the unilateral action or change is material in nature. *Turtle Bay Resorts*, 355 NLRB 1272,

1272−1273 (2010); *Frontier Hotel & Casino*, 323 NLRB 815, 817−818 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997); *Ernst Home Centers, Inc.*, 308 NLRB 848, 848−849 (1992); *American Commercial Lines,* 291 NLRB 1066, 1072 (1988). More to the point, even when an employer accuses a union agent of misconduct, the employer is required to give the union notice and an opportunity to bargain before changing rules regarding the agent's access so that the parties can work together to arrive at a solution to the problem. *Frontier Hotel & Casino*, 323 NLRB at 817. Here, Ozual was excluded from the facility because of her disruptive conduct. However, Rochelle Park merely informed the Union as a fait accompli. As a result, the Union had no opportunity to bargain over Rochelle Park's decision to unilaterally deny Union member's access to their representative at a critical juncture in the bargaining and strike preparation process.

Under the circumstances, Rochelle Park violated Section 8(a)(5) and (1) by failing to afford the Union an opportunity to bargain over its decision in late August to deny Ozual access to its facility.

VI. REFUSAL TO REINSTATE STRIKING EMPLOYEES

The complaint further alleges that the Rochelle Park violated Section 8(a)(3) and (1) of the Act by refusing to reinstate ten employees when they returned to work the day after the strike ended: Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, and Gabby Youmane. Rochelle Park disagrees, insisting that the ten employees were not reinstated because they engaged in an economic rather than unfair labor practice strike.

Strikes may be categorized as either economic or unfair labor practice strikes. *Spurlino Materials, LLC,* et ano*. v. NLRB*, 805 F.3d 1131, 1136–1137 (D.C. Cir. 2015), citing *Gen. Indus. Emps. Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991). That categorization carries significant consequences. Economic strikers run the risk of replacement if, during the strike, the employer takes on permanent new hires. *NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972); *Gen. Indus. Emps. Union*, 951 F.2d at 1311. In such instances, economic strikers are entitled, upon their unconditional offers to return to work, to reinstatement to their former or substantially equivalent positions, if no permanent replacements have been hired to replace them and the positions remain open. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–379 (1967).

In the case of an unfair labor practice strike, employees are entitled to immediate reinstatement to their former positions upon their unconditional offers to return to work, even if the employer has hired replacements. See *International Van Lines*, 409 U.S. at 50–51, 93; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Gen. Indus. Emps. Union*, 951 F.2d at 1311; *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir.1989). Accordingly, an employer violates the Act if it fails to reinstate such strikers once they have made an unconditional offer to return to work. See *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 141–142 (D.C. Cir. 1999).

In determining whether the General Counsel has met his burden of establishing that an employer's unfair labor practices caused the employee's decision to go on strike, the Board looks to the employees' motivations for striking, considering both objective and subjective evidence. See *Gen. Indus. Emps. Union*, 951 F.2d at 1312; *Spurlino Materials*, 357 NLRB 1510, 1524−1525 (2011); *Executive Management Services*, 355 NLRB 185, 194−196 (2010); *Chicago Beef Co. v. Local 26, United Food and Commercial Workers Union*, 298 NLRB 1039 (1990). A strike wholly driven by the desire of employees to obtain favorable employment terms is an economic strike. When employees strike as a result of an employer's unfair labor practices, the strike is an unfair labor practice strike. See *International Van Lines*, 409 U.S. at 50–51; *Gen. Indus. Emps. Union,* 951 F.2d at 1311.

In this case, there is little testimony by employees as to their reasons for participating in the strike. There is objective proof of motivation for the strike, however, in the statements by Union officials and signs carried employees during informational and strike picketing. Through public statements, media publications and its website, the Union conveyed the mixed message that it sought redress for Rochelle Park's unfair labor practices *and* economic reasons (e.g., better wages, health insurance coverage and pension plan). The Union followed up on these actions by filing unfair labor practice charges and informing employees that Board complaints would issue. See *Citizens Publishing & Printing Co.,* 263 F.3d 224, 235 (3d Cir. 2001) (facts supported finding that Board's decision to issue a complaint "galvanized bargaining unit members' belief that an unfair labor practice had been committed and served as the flashpoint for discussion about calling a strike").

It is evident that meaningful collective bargaining was hamstrung at the outset by Rochelle Park's failure to provide responsive information prior to March 27 and then refusing to commence bargaining with Rochelle Park's chosen bargaining committee. While certainly not dispositive of the reasons for an eventual strike nearly six months later, it set the tone for a ragged path of trickling information and resistance in providing relevant work schedule and health insurance related information.

Under Board law, the dual motivation of Rochelle Park's employees to strike in order to improve their bargaining position and assail Rochelle Park's unfair labor practices means that the strike must be characterized as an unfair labor practice strike. See *Executive Management Services*, supra at 193; *Domsey Trading Corp.*, 310 NLRB 777, 791 (1993); *General Drivers & Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C.Cir.1962). "The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor." *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C.Cir.1990); *Alwin Mfg. Co.*, 192 F.3d at 141; *Gen. Indus. Emps. Union,* 951 F.2d at 1311. See also *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 471 (3d Cir.1983); *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir.1972).

The Union, on behalf of the striking workers, gave Rochelle Park a 10-day notice prior to the strike that employees would strike on September 17, 18, and 19. On September 18, the Union notified Rochelle Park that the striking employees would return to work on September 20. Under the circumstances, Ro-

chelle Park's refusal to reinstate Dominguez, Hormaza, Gaston, Lewis, Alston, Abellard, Padda, Meronvil, Vilceus, and Youmane upon their return to work on or after September 20 violated Section 8(a)(3) and (1) of the Act.

VII. CHANGES TO WORK HOURS AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT

The complaint also alleges that Rochelle Park committed various violations of Section 8(a)(3) and (1) of the Act by discriminatorily reducing the work hours of Fritz, Dominguez, Hormaza, Gaston, and Alston when they returned to work after the strike. Rochelle Park contends that these employees were temporarily or permanently replaced by temporary agency employees or new employees, and provided with the work that was available when they returned.

In determining whether adverse employment action is attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line***,** 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB,* 764 F.2d 1423, 1428−1429 (11th Cir. 1985). Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. 764 F.2d at 1429.

All five employees engaged in protected concerted activity, to wit, the 3-day strike. Rochelle Park's administrator and several supervisors expressed repeatedly their animus towards a strike and predicted adverse consequences for those employees who participated. Some of those communications by Giles, Concepcion, and Caldona constituted unlawful threats and interrogation. In addition, Giles distributed a memorandum shortly before the strike accusing the Union of distorting "The Truth" as to the cause of the impending strike. The only differences were in the nature of the significant adverse action suffered by each employee.

Fritz served played a prominent role as a union delegate in speaking out against Rochelle Park during rallies and participated in the strike. He incurred adverse action after the strike in the form of a reduction from a full-time position to a reduced 4-day work week.

Alston was a longtime shop steward and delegate. She attended all of the bargaining sessions, participated in the August 27 strike vote, served Giles with the Union's 10-day strike notice, and participated in all 3 days of the strike. She was reinstated on September 22, but was off the schedule for all but 2 days over the next 2 weeks. On October 5, her full-time schedule was restored but she has been deprived of overtime work opportunities since then. That adverse action was admittedly attributable to her participation in the strike.

Gaston also served a prominent role as a union delegate. He attended the bargaining sessions and participated in all 3 days of the strike. After the strike, he incurred a significant reduction in work hours and his work was limited to, at most, 4 days per week.

Unlike the previous three employees, Dominguez and Hormaza did not play prominent roles in the strike planning and execution. They did, however, participate in all 3 days of the strike and, upon returning to work on September 23, were rewarded with a demotion to part-time work. German, their supervisor, admitted that the adverse action was, as he predicted beforehand, a consequence of their choice to participate in the strike.

The General Counsel having established a prima facie case, the burden shifted to Rochelle Park to prove that union activity was not a motivating factor in the changes to the terms and condition of employment of Fritz, Dominguez, Hormaza, Gaston, and Alston. *Wright Line*, supra; approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). That burden is impossible to meet here where the adverse action flowed from Rochelle Park's unfair labor practices in refusing to reinstate them after the strike and their former positions continued to exist after they were reinstated.

Under the circumstances, after reinstating Fritz, Dominguez, Hormaza, Gaston, and Alston, Rochelle Park discriminatorily changed their terms and conditions of employment by reducing their work hours in violation of Section 8(a)(3) and (1). *Wright Line*, supra; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

CONCLUSIONS OF LAW

1. Rochelle Park was an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. The Union was a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times, Kristine Giles, Dexter Caldona, Arlene Concepcion, and Peter German, were supervisors of Rochelle Park within the meaning of Section 2(11) the Act, and David Jasinski, Esq., Regina Figueroa, Moses Adu, and Susan Posluzny were agents within the meaning of Section 2(13) of the Act.

4. Rochelle Park violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing on March 27, 2014, to bargain in good faith with the Union's chosen bargaining committee.

(b) Delaying for 3 months before producing information requested by the Union which was relevant and necessary to its role as unit employees' labor representative prior to the commencement of collective bargaining between the parties on March 27, 2014.

(c) Refusing to provide daily work schedule information requested by the Union on May 21, 2014, and health insurance

information requested on July 30, 2014, all of which was relevant and necessary to the Union's role as unit employees' representative.

5. Rochelle Park violated Section 8(a)(1) of the Act in the following manner:

(a) Concepcion and German threatened employees during individual and group meetings in August and September 2014 with loss of their jobs, loss of work hours or other changes in their terms and conditions of employment if they went on strike.

(b) Giles, Concepcion, and German coercively interrogated individual employees in August and September 2014 as to whether they were going to participate in the strike.

(c) Rochelle Park unilaterally changed employees' terms and conditions of employment without giving the opportunity to bargain over such change when it denied Christina Ozual access to meet with employees in the facility in August 2014.

6. By failing and refusing, on or after September 20, to immediately reinstate ten employees who engaged in protected concerted activity and made an unconditional offer to return to work, Rochelle Park violated Section 8(a)(3) and (1) of the Act.

7. Rochelle Park discriminatorily changed employees' terms and conditions of employment in violation of Section 8(a)(3) and (1) by reducing the work hours of Fritz, Dominguez, Hormaza, and Gaston, and denying Alston the opportunity to work overtime, because they participated in and supported the strike.

8. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Rochelle Park has engaged in certain unfair labor practices, I shall order it to take certain affirmative action designed to effectuate the policies of the Act. On request, Rochelle Park shall bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment, timely provide the Union with relevant information it has requested and, if an understanding is reached, embody the understanding in a signed agreement. Rochelle Park shall also, within 14 days of the Board's Order, offer the ten employees who engaged in an unfair labor practice strike in September 2014, and were not immediately reinstated on request, recalled to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed. I shall also order Rochelle Park to make whole the unfair labor practice strikers who were denied reinstatement for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I shall order Rochelle Park to expunge from its files any reference to the failure to reinstate the strikers, and to notify them in writing that this has been done. Finally, I shall order Rochelle Park to post a notice to all employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Rochelle Park shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Rochelle Park shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[81]

ORDER

The Respondent, Alaris Health at Rochelle Park, Rochelle Park, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting 1199, SEIU United Healthcare Workers East or any other union.

(b) Coercively threatening any employee with job loss or loss of work hours if they go on strike or engage in other union activities.

(c) Coercively interrogating any employee as to whether he or she intends to participate in a strike or engage in other union activities.

(d) Refusing to bargain with the Union's chosen bargaining committee.

(e) Refusing to provide or delaying in providing necessary and relevant information to the Union.

(f) Refusing to permit the Union's representative to meet at reasonable times with employees in the facility's employee break room.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody and, if an understanding is reached, embody the understanding in a signed agreement:

> All CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

(b) On request, furnish to the Union in a timely manner the information requested concerning daily work schedules and health insurance on May 21 and July 30, 2014.

(c) On request, permit the Union's representative to meet at reasonable times with employees in the facility's employee break room.

(d) Within 14 days from the date of the Board's Order, offer Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley

[81] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Lewis, Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, and Jean Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, and Jean Fritz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of the Board's Order, expunge from its files any reference to the failure to reinstate the strikers, and to notify them in writing that this has been done and that such adverse actions will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Rochelle Park, New Jersey, copies of the attached notice marked "Appendix"[82] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 25, 2016

[82] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting 1199, SEIU United Healthcare Workers East, or any other union.

WE WILL NOT coercively threaten you with job loss or loss of work hours if you go on strike or engage in any other union activities.

WE WILL NOT coercively interrogate you as to whether or not you intend to participate in a strike or engage in other union activities.

WE WILL NOT prohibit the Union's representative from meeting at reasonable times with employees in the facility's employee break room.

WE WILL NOT refuse to timely provide the Union with necessary and relevant information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

WE WILL, on request, permit the Union's representative to meet at reasonable times with employees in the facility's employee break room.

WE WILL, on request, furnish to the Union in a timely manner the information requested concerning daily work schedules and health insurance on May 21 and July 30, 2014.

WE WILL, within 14 days from the date of this Order, offer Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, and Jean Fritz full reinstatement to their former jobs or, if those jobs no longer

exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, and Jean Fritz whole for any loss of earnings and other benefits resulting from our refusal to reinstate them or, upon their reinstatement, reducing their work hours, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Julieta Dominguez, Jacinta Hormaza, Jamir Gaston, Rodley Lewis, Deloris Alston, Jean Abellard, Rajvinder Padda, Evelyn Meronvil, Santia Vilceus, Gabby Youmane, and Jean Fritz for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year.

ALARIS HEALTH AT ROCHELLE PARK

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-125023 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.